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No. 730

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

WISCONSIN & MICHIGAN STEAMSHIP COMPANY,
Petitioner

vs.

CORPORATION AND SECURITIES COMMISSION,
Respondent

REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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For the purpose of this Reply Brief petitioner will reply to the headings used by respondent in its Brief in Opposition to Petition for Writ of Certiorari.

STATUTES INVOLVED

Here it is stated on page 3:

> "Respondent disagrees with petitioner's statement that it did not comply with the state statutory provisions, which question is purely one of state law, posing no federal question. Furthermore, Section 5e has no application in this cause for the reason that petitioner did not attempt to bring its apportion-

ment problem within the scope of the Section 5e provision."

As pointed out in petitioner's application for refund for the years 1952, 1953 and 1954, Appendix "G"[1], application for redetermination for the year 1955, in the proceedings before the Corporation Tax Appeal Board, and in the Court below, it has been claimed that Section 5c, by its very terms, laid an undue burden on interstate commerce. The formula of the section provides the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state. Respondent has applied this formula irrespective of the wholly interstate nature of petitioner's business activities and utter lack of any intrastate business. The Supplemental Annual Reports for 1952, 1953 and 1954, Appellant's Exhibits 1A, 2A and 3A, as well as the Annual Report for the year 1955, on which the then commissioner of the Corporation and Securities Comm ission affirmed the position of petitioner, Appendices "D" and "E," and the Annual Reports for the subsequent years 1956, 1957, 1958 and 1959, Appellant's Exhibits 7, 8, 9 and 10, clearly show that petitioner engaged wholly in interstate commerce between Michigan and Wisconsin and that no intrastate business was conducted.

Section 5e *directs* the Commission to adjust the formula of Section 5c if it does not properly reflect the activity, business, receipts and capital of a taxpayer reasonably attributable to the state. Here petitioner engaged in no intra-

[1]Where appendix or appendices are referred to by capital letter in quotes they are the appendices to petition for writ of certiorari.

state business whatever, its business being wholly interstate commerce. In applying therefore Section 5c without reference to or use of Section 5e there can be but one inescapable conclusion, namely, it is *only* the interstate business of petitioner which is being made the basis of the tax. Petitioner has repeatedly stressed this fact and it is a misstatement to argue that petitioner has never attempted to bring its apportionment problem within the scope of the 5e provision.

QUESTIONS PRESENTED

We believe the quotation from the opinion of the Supreme Court of Michigan, page 5 of respondent's brief, demonstrates that a federal question and the constitutionality of Section 5c of the Act as interpreted by the Commission and the Corporation Tax Appeal Board was before the court below inasmuch as the court did state that for the purpose of its decision it would assume, as petitioner, appellant below, claimed, that its total business transacted in Michigan was solely interstate in character. The Supreme Court of the State of Michigan in *Gartland Steamship Company* v. *Corporation and Securities Commission*, 339 Mich. 661 ruled that in arriving at the paid-up capital and surplus reasonably attributable to Michigan, the Commission would necessarily have to exclude wholly interstate commerce. The court said at page 672.

> "The commission's construction of PA 1921, No. 85, as amended by PA 1952, No. 183 (CL 1948, and CLS 1952, § 450.301 et seq. (Stat Ann and Stat Ann 1963 Cum Supp § 21.201 et seq.)), that it had the right to include tonnage transported in interstate and foreign commerce is contrary to the due process clause of the 14th amendment."

STATEMENT OF THE CASE

Here respondent states that it cannot accept petitioner's statement of the case as relevant to the question sought to be raised and then proceeds to quote at page 7 of its brief that portion of the opinion of the court below where it states:

> "Appellant does not claim that the State seeks to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan. Nor does the State claim in this case that it could do so lawfully."

Petitioner, appellant below, has claimed from the time it asked for a redetermination of its tax for the year 1955 that the State, or respondent, sought to impose a tax upon it, a foreign corporation, for the privilege of conducting its interstate business in Michigan and the State, or respondent, has claimed it could lawfully do so. This was stressed in petitioner's application for a rehearing which the court below denied. Petitioner respectfully directs the attention of the Court to petitioner's appendices "D," "E" and "F."

At page 8 of its brief respondent quotes as follows from the opinion of the court below:

> "* * * it is not necessary to review the corporation tax appeal board's finding that appellant was engaged in such intrastate business during the period involved in this appeal"

and then proceeds to argue that the Corporation Tax Appeal Board's findings were controlling. It is well to note however, that the court below, as previously pointed out, accepted petitioner's contention that all of its business was interstate for the purpose of its decision and therefore respondent's argument pertaining to the findings of the Corporation Tax Appeal Board is irrelevant and immaterial.

With respect to the statement on page 9 that petitioner never requested a redetermination of its franchise fees for the years in question, such is manifestly untrue. Petitioner petitioned for a refund for overpayment of the taxes for the years 1952, 1953 and 1954, Appendix "G," and furnished all information requested by respondent for the years 1956, 1957, 1958 and 1959 and never knew until receipt of Appendix "I" that those years were even under consideration by the commission as petitioner had paid the same tax for those years as had been accepted by the commission for the year 1955. From a reading of the transcript of Miss Sawasky's testimony quoted at pages 8, 9 and 10 of the petition, the commission presumably made a redetermination on its own initiative under Section 5c without any reference whatever to the mandate of Section 5c for the years 1956, 1957, 1958 and 1959 and with total disregard of the court's decision in the Gartland case, supra.

At page 9 of respondent's brief in opposition it is stated:

> "Further, petitioner has furnished no evidence to establish that the apportionment formula contained in 5c of Act No. 85 of the Michigan Public Acts of 1921, as amended, attributes to the State of Michigan an unreasonable portion of petitioner's paid-up capital and surplus, assuming that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or activity is denoted intrastate, interstate or foreign in character."

Within this statement of respondent lies the crux of the problem for it *cannot* be assumed that the State of Michigan is permitted, as a matter of law, to measure a corporate privilege fee by the activity or business done within its territorial limits, irrespective of whether that business or

activity is denoted intrastate, interstate or foreign in character.

The cases refuting this bold statement by respondent are legion. See *Cheney Bros. Co.* v. *Mass.*, 246 U. S. 147; ***Alpha Portland Cement Co.*** v. ***Mass.***, 268 U. S. 303; *Ozark Pipe Line Corp.* v. *Monier*, 266 U. S. 555; *East Ohio Gas Company* v. *Tax Commission of Ohio*, 283 U. S. 465; ***American Barge Line Company*** v. ***Koontz***, 68 S.E. (2nd) 56; *Cooney* v. *Mountain States Telephone & Telegraph Co.*, 294 U. S. 384 all cited and discussed at length at pages 22, 23, 24 and 27 of the Petition for Writ of Certiorari.

The rule governing the case now under consideration was clearly stated in *Commission of Corporation & Tax'n* v. *Ford Motor Co.*, 308 Mass. 558, 33 NE(2) 318:

> "A state is without power to tax a foreign corporation for the privilege of engaging in interstate commerce, or to exact an excise from a foreign corporation that conducts only an interstate business within the state."

Again, as previously stressed, the business or traffic of petitioner was wholly interstate and Section 5e of the Act is mandatory and the formula under that act produced no tax. Accordingly, the minimum tax provided in Section 4 was applicable. When the facts disclosed that a franchise tax has been assessed which is clearly in violation of the Constitution, Article 1, Section 8, as a franchise tax on petitioner's interstate commerce this is all the evidence required.

With respect to laws of the state of Wisconsin there was no evidence or proof in this respect either before the Corporation Tax Appeal Board or the court below and it is not relevant nor material to the issues here involved.

REASONS FOR DISMISSING THE WRIT

I

"The Petitioner does not present a substantial federal question."

Certainly the constitutionality of the statute, Section 5c, was before the court below as was the question as to whether or not the court's interpretation of the statute placed an undue burden on interstate commerce under the federal constitution. In the cases cited by respondent at pages 13 and 14 respondent overlooks one salient factor and, that is, a taxpayer must be engaged *both* in interstate and intrastate commerce to permit a state to compute its franchise tax for the privilege of carrying on intrastate business upon both interstate and intrastate commerce. No case to petitioner's knowledge has gone so far as to permit a state to compute the franchise tax on wholly interstate commerce. This is the very situation the Commerce Clause prohibits. In petitioner's case here the court below accepted, as mentioned above, petitioner's claim it engaged wholly in interstate commerce. Despite this clear and unequivocal statement, the court proceeded to uphold the franchise tax which in this instance is based solely and completely upon petitioner's interstate commerce.

In citing the *Spector Motor* case, 340 U.S. 602, at page 14 of its brief, respondent cites only that portion of the case which appears to support its position. The true holding of the case, however, is set forth at page 609 where the court stated:

> "This Court heretofore has struck down, under the Commerce Clause, state taxes upon the privilege of carrying on a business that was exclusively interstate in character."

And at page 610:

> "In this field there is not only reason but long-established precedent for keeping the federal privilege of carrying on exclusively interstate commerce free from state taxation. To do so gives lateral support to one of the cornerstones of our constitutional law—*McCulloch* v. *Maryland, supra.*"

At the bottom of page 14 of respondent's brief in opposition it is stated:

> "No authorities have been found to the contrary, and none have been cited for the contrary proposition by petitioner."

The cases cited in respondent's brief are not in point nor is the quotation from the Spector Motor Service, supra. Much to the contrary the basic decision of the Spector Motor case supports petitioner's position in every respect. Petitioner did cite the *Gartland case*, supra, in which the Supreme Court of the State of Michigan said at page 674:

> "It is the opinion of this Court that by the enactment of PA 1962, No. 183, § 5e (CLS 1952, § 450.305e (Stat Ann 1953 Cum Supp § 21.208(5)), the legislature gave to the commission the right and duty to apply a method of determining Gartland's tax 'calculated to effect a fair and proper allocation according to the receipts, activity, business and capital reasonably attributable to this State.'
>
> "The order and opinion of the corporation tax appeal board affirming the computation of the commission is reversed, and the commission is directed to recompute the annual privilege fee of Gartland Steamship Company, a Delaware corporation, excluding any and all cargoes transported in interstate and foreign commerce."

Until the instant case was before the Supreme Court of

the State of Michigan no other case except the Gartland case involved a water carrier or a foreign steamship company trading in and out of Michigan ports. The cases of *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196 and *Puget Sound Stevedoring Company* v. *State Tax Commission*, 302 U. S. 90, which are particularly in point as they involve water transportation are discussed at page 24 of the Petition for Writ of Certiorari.

2.

"Petitioner has not properly raised any federal question."

The federal question raised is simply whether a state may base its franchise tax for the privilege of engaging in intrastate business solely upon commerce which is exclusively interstate in character.

As pointed out, petitioner did no intrastate business during the years in question and had it done any such business it would have paid whatever tax in excess of $10.00 that the formula of Section 5c as adjusted by Section 5e might have required.

The question under note 4, page 12, needs no reply as we are dealing with Section 4 of the statute which provides for a $10.00 minimum fee. The Court is not concerned with the imaginary fees or amounts mentioned in the footnote.

3.

"The judgment of the Michigan Supreme Court is conclusive."

If this argument were true then all of the prior decisions of this Honorable Court having to do with franchise taxes by a state on interstate commerce can be held for naught and the decision of any State Supreme Court would be final with respect to its interpretation of the state statutes concerning franchise fees on domestic or foreign corporations

and Article 1, Section 8 of the federal constitution would be nullified. The lower court made no findings that the apportionment formula reasonably apportioned petitioner's paid-up capital and surplus to Michigan unless its affirmance of the Corporation Board of Tax Appeals may be so considered. The Corporation Board of Tax Appeals upheld the franchise fees as assessed by the Corporation and Securities Commission under Section 5c of the Act which the Supreme Court of the State of Michigan had struck down in the Gartland case, supra, despite the uncontroverted proof that petitioner engaged in no intrastate commerce within the State of Michigan and that its business was 100 percent interstate commerce between the port of Milwaukee, Wisconsin and Muskegon, Michigan.

CONCLUSION

Respondent, on page 18, quotes in part from page 19 of the Petition for the writ of certiorari as follows:

> "* * * it is petitioner's position that the state, through its legislative agency, respondent here, is prohibited by the Commerce Clause from including receipts or property derived from or used in interstate commerce in the formula used to measure a corporate privilege fee for a foreign corporation who has qualified to do business within a state * * *"

In quoting petitioner's position above respondent omits this most important sentence which immediately follows the portion quoted:

> "This being particularly true where the foreign corporation is not engaged in any local or intrastate commerce within the State of Michigan."

Respondent further states at page 18 of its brief:

> "As indicated above, this court has unequivocally

held on numerous occasions that receipts or income derived from or properly used in, interstate commerce may be included in the measure of a state corporate privilege fee."

Petitioner stresses that in the cases where the above statement proves true, the taxpayer engaged in *both* intrastate commerce and interstate commerce. It is on this point that respondent's argument is fallacious.

Section 5c of the statute provides that the annual franchise fee shall be measured by that portion of the corporation's paid-up capital and surplus as the sum of the tonnage of revenue passengers and revenue cargo first received or finally discharged by the carrier within this state is to the total of such tonnage so received and so discharged by such carrier within and without this state. To arrive at the ratio referred to in the statute the following formula would apply:

$$\frac{\text{Total tonnage received and discharged in Michigan}}{\text{Total tonnage received and discharged within and without the state}} = \text{Average Ratio}$$

In applying the formula of Section 5c as the court below directed the commission to do in the Gartland decision, supra, petitioner's interstate commerce must be excluded and may not be used in arriving at the average ratio with which that portion of the corporation's paid-up capital and surplus is used to measure the privilege fee. Petitioner engaged solely in interstate commerce. As a consequence the "total tonnage received and discharged in Michigan (intrastate commerce) called for in the above formula would be zero.

Interstate commerce can be considered in the formula, but *only* in the denominator thereof, i.e., total tonnages received and discharged within and without this state.

The fallacy of respondent's position is in the manner in which it attempts to use petitioner's interstate commerce in the formula to compute the average ratio. If petitioner, as here, engaged in *no* intrastate commerce the result is that only the minimum fee of $10.00 as provided in the statute is assessable. To permit respondent to include petitioner's interstate commerce in the numerator of the formula which calls for only those tonnages "received and discharged in Michigan" (intrastate commerce) is clearly in contravention of the statute. To do so results in a tax based solely upon petitioner's *interstate* commerce and this has been expressly forbidden by the court below and this Honorable Court as clearly in violation of the Commerce Clause of the U. S. Constitution.

It is therefore respectfully requested that a Writ of Certiorari issue to the Supreme Court of Michigan.

February 11, 1964

Respectfully submitted

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